No. 95-1779

IN THE
SUPREME COURT OF THE UNITED STATES,
October Term, 1995

MICHAEL BOWERSOX,
Superintendent of the Potosi Correctional Center

Petitioner,

v.

ROBERT DRISCOLL,
A State Prisoner Under Sentence Of Death,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENT ROBERT DRISCOLL'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRUCE DAYTON LIVINGSTON
Counsel of Record
120 South Central Ave., Suite 1510
St. Louis, MO 63105
(314) 863-4151 (phone)
(314) 863-0720 (fax)

Attorney For Respondent

CAPITAL CASE

QUESTION PRESENTED

Whether the Antiterrorism and Effective Death Penalty Act Of 1996 ("the Act"), Pub. L. No. 104-132, 110 Stat. 1214, applies retroactively to habeas corpus cases in which, before passage of the Act, the mandate had already issued after a decision on the merits by a United States Court of Appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

TABLE OF CASES

TABLE OF STATUTES AND OTHER AUTHORITIES

ADDITIONAL CONSTITUTIONAL PROVISIONS INVOLVED

The Suspension Clause of the United States Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the Public Safety may require it.

U.S. Const., art. I, § 9, cl. 2.

In pertinent part, Article III of the United States Constitution provides:

> SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.
>
> * * *
>
> SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arisisng under this Constitution, the Laws of the United States....
>
> In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Const., art. III, §§ 1 and 2.

In pertinent part, the Fifth Amendment of the United States Constitution provides:

> No person shall ... be deprived of life, liberty, or property, without due process of law....

U.S. Const., amend. V.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

In pertinent part, prior to its revision by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d) provided:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction ..., evidenced by a written finding, written opinion, or other relieable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--
>
> * * *
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, ... unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. § 2254(d) (repealed April 24, 1996).

In pertinent part, section 557.036 Mo. Rev. Stat. (Cum. Supp. 1984) ("the general criminal sentencing statute") provides as follows:

> 1. Subject to the limitation provided in Subsection 3 upon a finding of guilt upon verdict or plea, the court shall decide the extent or duration of sentence or other disposition to be imposed under all the circumstances, having regard to the nature and circumstances of the offense and the history and character of the defendant and render judgment accordingly.
>
> 2. The court shall instruct the jury as to the range of punishment authorized by statute and upon a finding of guilt to assess and declare the punishment as part of their verdict, unless [sentencing by the jury is waived by the defendant or the state proves that defendant is a recidivist or violent offender]. If the jury finds the defendant guilty but cannot agree on the punishment to be assessed, the court shall proceed as provided in subsection 1 of this section. If there be a trial by jury and the jury is to assess punishment and if after due deliberation by the jury the court finds the jury cannot agree on punishment, then the court may instruct the jury that if it cannot agree on punishment then the court may instruct the jury that if it cannot agree on punishment that it may return its verdict without assessing punishment and the court will assess punishment.
>
> 3. If the jury returns a verdict of guilty and declares a term of imprisonment as provided in subsection 2 of this section, the court shall proceed as provided in subsection 1 of this section except that any term of imprisonment imposed cannot exceed the term declared by the jury unless the term declared by the jury is less than the authorized lowest term for the offense, in which event the court cannot impose a term of imprisonment greater than the lowest term provided for the offense.

Mo. Rev. Stat. § 557.036 (Cum. Supp. 1984).

In pertinent part Mo. Ann. Stat. § 565.006.2 (Vernon's 1979)(repealed 1984) ("the capital sentencing statute") provided that:

> The jury, or the judge in cases tried by the judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; except that, the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment.

Mo. Ann. Stat. § 565.006.2 (Vernon's 1979)(repealed 1984).

Missouri Supreme Court Rule 29.05 ("the general sentence reduction rule") provides:

> The court shall have power to reduce the punishment within the statutory limits prescribed for the offense if it finds that the punishment is excessive.

Mo. S. Ct. R. 29.05.

STATEMENT UNDER RULE 29.4(b)

Some of Respondent's arguments (against the grant of a writ of certiorari) draw into question the constitutionality of an act of Congress affecting the public interest, the Antiterrorism And Effective Death Penalty Act of 1996 ("the Act"), Pub. L. No. 104-132, 110 Stat. 1214, particularly if the Act were applied and construed as petitioner advocates. The United States has an interest in those matters raised herein which question the constitutionality of the Act. As neither the United States, nor an officer, agency or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

No court of the United States has certified to the Attorney General, pursuant to 28 U.S.C. § 2403(a), the fact that the constitutionality of the Act has been drawn into question.

STATEMENT OF THE CASE

Respondent Driscoll generally acknowledges Warden Bowersox's (hereinafter "the State" or "Missouri") Statement of the Case,[1] but adds that substantial additional facts from the trial court record are relevant to his attempt to obtain this Court's discretionary review, and that some of the purported facts are not supported by the State's record citations.

---

[1] Driscoll specifically does not adopt factual allegations directed toward Roy Roberts unless specifically addressed by Driscoll. Generally, the allegations directed toward Roberts are irrelevant to whether Driscoll participated in Jackson's murder, and therefore Driscoll does not address them.

In particular, the evidence of Driscoll actually stabbing the murder victim, Jackson, is very weak. Three different guards who were involved in the struggle only saw Rodney Carr (sometimes spelled Karr in the transcripts) stab Officer Jackson. Transcript ("TR.") at 882 (Halley); id. at 986-88, 991, 1006 (Wilson); id. at 1033 (Hess). None of them saw Driscoll stab anyone, either officers Jackson or Maupin. Id. See also id. at 976 (Maupin). Given the uniform testimony of these guards that Rodney Carr stabbed officer Jackson and the absence of any testimony from any guards that Driscoll stabbed anyone, grave doubt exists as to whether Driscoll stabbed Jackson.

Moreover, the testimony of Dr. Dix, the doctor that did the autopsy on officer Jackson, bolsters the conclusion that Rodney Carr, not Driscoll, killed officer Jackson. Significantly, in response to a question of whether he could determine from the stab wounds whether one or two knives caused the injuries, Dr. Dix stated that "[g]iven the nature of the wounds, I would say that one knife caused them, but I can't be absolutely sure." TR. 1080-81. The unanimous, multiple eyewitness testimony of the prison guards was that Carr stabbed Jackson; the autopsy report points to one knife only being used on Jackson. Thus, only one stabber, Rodney Carr, is implicated by the testimony of the most reliable, non-inmate eyewitnesses and the forensic evidence.

In contrast to this testimony pointing squarely at Rodney Carr as Jackson's stabber, the state only cites the inconsistent, self-serving testimony of inmates, some of whose stories changed

dramatically over time, to implicate Driscoll in the stabbing of Jackson. App. at A7 (citing transcript pages 909-10, 913, 1023, 1042-43). Those inmates are Joseph Vogelpohl and Edward Ruegg (sometimes spelled Rugg in transcripts). Id. (not including TR. 1023). the State also cites the testimony of corrections officer Hess as another eyewitness identification of Driscoll, Id. (citing TR. 1023), but the State is mistaken as to Hess' testimony. Hess testified that Rodney Carr, not Driscoll, was the only person he saw stab officer Jackson. TR. 1033.

Unlike the consistent testimony of the guards, the testimony of inmates Vogelpohl and Ruegg was unreliable, inconsistent and contradicted. Vogelpohl and Ruegg stated that Driscoll stabbed Jackson, but Vogelpohl did so only after failing to identify Driscoll as one of the stabbers in the course of several interviews as part of the State's investigation of the riot, Resp. Ex. F, Rule 27.26 Motion Hearing Transcript ("PCR TR.") 11-21. See Driscoll v. Delo, 71 F.3d 701, 709-11 (8th Cir. 1995), Appendix to Petition For Writ Of Certiorari, ("App.") at A17-A22; Magistrate's Review and Recommendation ("R&R"), App. A89-A92. Cf. Resp. Ex. B-1, Direct Appeal Legal File ("DALF") 100-01 (statement of Vogelpohl given the day after the riot which (1) only indicated that he saw Driscoll punch, not stab Jackson, (2) that Driscoll said only that "one of the officers...had been stuck," while it (3) failed to mention anything like the statement attributed by Vogelpohl to Driscoll at trial that Driscoll said immediately after the incident "[d]id I take him

out JoJo[,] or did I take him out?"). Likewise, Ruegg's identification of Driscoll as a stabber occurred only after he had been severely beaten. TR. 1048, 1057-59. On the stand, Ruegg admitted that he told the guards "anything they wanted to hear, just so they would leave me alone." TR. 1058-59. Moreover, Ruegg's testimony was contradicted by Ruegg's admissions to two other inmates that he did not see Driscoll stab Jackson. See TR. 1593, 1595-96, 1598-99, 1606 (testimony of inmate Lassen) (also contradicting inmate Vogelpohl); id. at 1667 (testimony of inmate Hobbs).

At the Rule 27.26 Hearing ("PCR Hearing") Driscoll's trial lawyer, Robinson, testified that he failed to cross examine inmate Vogelpohl about Vogelpohl's prior inconsistent statements. PCR TR. 77-78. Robinson also admitted that his failure to cross examine Vogelpohl was not a matter of trial strategy. Id.

All that Driscoll admitted was that he had stabbed a guard. TR. 1258, 1260. He did not admit that he stabbed Jackson. The knife which was identified as allegedly being Driscoll's, Ex. 24, had only type A blood on it, TR. 1856, the same as Officer Maupin's (who had been stabbed in the shoulder). TR. 1258. Officer Jackson had type O blood. Id. The State's blood expert, Dr. Su, testified that with the antigen test, type A blood "masks" type O blood. Id. at 1212-13. She agreed that the knife only had type A blood on it and that anything else (e.g., whether it had type O blood on it also) would just be speculation. TR. 1217. Driscoll's attorney failed to ask her about whether any

other tests had been performed that could have identified whether type O blood was on the knife. Driscoll's lawyer also failed to ask Dr. Su any questions to refute the theory that Jackson's type A blood was simply wiped off when Maupin was stabbed.

At the PCR Hearing Dr. Su testified that another test (the "Lattes" test) had been performed, which does not allow "masking" of blood and established that no type O blood was found on the knife. PCR TR. 29-30. She acknowledged that had she been asked at trial, she would have had to admit that "there was no type O blood on that knife," and that she could not say that a second stabbing would clear the blood from a first stabbing from the knife. Id. at 32.

Driscoll's lawyer testified at the PCR Hearing that he received the blood test results, PCR TR. 74-75, that he did not know of any other tests that could have been performed on the knife, id. at 74, that he was unaware of any scientific evidence that could have rebutted the State's "masking" argument, id. 91, and that he did not interview Dr. Su before her trial testimony. Id. at 74.

During voir dire the prosecution made a number of inaccurate and misleading statements about the jury's role in sentencing. Those statements basically told the jury that it was only a recommending body, that the judge acts as a thirteenth juror and sentences the defendant, and that it "doesn't matter whether you return a recommendation for the death penalty" because the judge "can overrule you." TR. 555. See also TR. 480-83, 512, 519,

520, 533-34, 538, 540, 577, 580, 606, 607. See generally 71 F.3d at 711 n.8, App. at A23 n.8 (court of appeals opinion); App. at A73-A74 (magistrate's opinion reprinting prosecutor's comments). This pattern continued into closing argument; the prosecutor repeatedly told the jury that it was just recommending a sentence to the judge to allow him to consider both options. See, e.g., TR. 2003, 2004, 2103, 2106. See generally App. at A74-A75 (reprinting prosecutor's comments). Driscoll's lawyer never objected to any of these references at trial. He testified that he did not realize that the prosecution's use of the word "recommend" was objectionable. PCR TR. 82.

The jailhouse riot involved a mob of as many as 40 inmates. TR. 1027. See also TR. 1385 (30 inmates); id. at 1356 (20 or more inmates involved). These were inmates who were drunk, having consumed substantial quantities of "hooch" or homemade wine. TR. 802, 903-04, 912, 1124-25; DALF 134. The riot was precipitated by the raucous, drunken behavior of inmate Jimmy Jenkins, DALF 128, TR. 1398, who was so disruptive that he had to be forcibly removed from his cell and wing of the prison. DALF 128; TR. 1040-41. His attempted removal from the wing by Officer Jackson and others triggered the rush on the guards by other drunken inmates who didn't want Jenkins removed. TR. 1040-41. During the drunken melee, Jackson was stabbed to death, and Officer Maupin was stabbed in the shoulder. TR. 973. Inmate Charles Bandy testified that Jimmy Jenkins stabbed Officer Jackson. TR. 1314, 1318.

After the melee, Officer Darnell discovered fifteen to twenty knives or other weapons were left on the scene, three of which appeared to Darnell to be bloody. TR. 1553, 1571-72. Curiously, two of those knives were "lost," as the State could produce only one knife with blood on it at Driscoll's trial. TR. 1216.

Obviously, the rioting inmates faced all sorts of consequences for their participation, ranging from beatings by guards, TR. 915-16, 920, 935-38 (Vogelpohl testimony); TR. 1043, 1048, 1057-59 (Ruegg testimony); TR. 1362 (Watkins testimony); TR. 1394-98, 1406-07 (Boland testimony); TR. 326-37 (Driscoll testimony), to conduct violation write-ups, to transfers to other more secured prisons or areas, or to criminal prosecution. E.g., TR. 921, 927, 931 (Vogelpohl); TR. 1050 (Ruegg); DALF 105, 122, 151 (Vogelpohl, Jenkins and Ruegg). Among the drunken inmates[2] amidst the melee were the only "eyewitnesses" to Driscoll's alleged stabbing of Officer Jackson, inmates Ruegg, TR. 944, 1041, 1043, 1045, 1322, 1354, 1401; DALF 142, and Vogelpohl. TR. 909, 916, 1354. Of course, for participating in the riot, inmates Ruegg and Vogelpohl received conduct violation citations, DALF 105, 151; TR. 927, 931,[3] and thus were especially subject to pressure to "cooperate" with the investigation. They did, and

---

[2] TR. 912, 945-46, 952 (Vogelpohl, an alcoholic, drank 64 ounces of wine and was "high"); TR. 1037-38 (Ruegg had been drinking wine and was "light-headed").

[3] See also DALF 122 (similar conduct violation issued to inmate Jenkins).

rather than receive the punishment they deserved, they were instead rewarded. TR. 924, 931, 1052.

The beatings administered by prison authorities also encouraged inmates Vogelpohl and Ruegg to cooperate with the investigation. The beatings that Ruegg received frightened him, TR. 1057-58, and made him tell the guards "anything they wanted to hear just so they would leave me alone." TR. 1058-59. Vogelpohl's repeated beatings may have taken their toll, also, and led him to change his story, though he insists that he changed his story only after he felt safe and was placed in protective custody. TR. 915-16, 920-21, 935-38.

Other facts will be woven into the argument portion of this brief as appropriate.

ARGUMENT

Petitioner contends that this Court should spend its valuable time on this case "to give guidance to the lower courts" on the application of Section 104(3) of The Antiterrorism And Effective Death Penalty Act Of 1996 ("the Act"), Pub. L. No. 104-132, 110 Stat. 1214, amending 28 U.S.C. § 2254(d). See generally App. at. A165-A172.[4] This Court should deny review of this case.

[4] The Appendix mis-numbers the sections of the Act. Section 601 should be section 101, section 602 should be section 102, etc.

In addition, the State only included the Chapter 153 revisions to the habeas corpus statutes in the Appendix to its petition for writ of certiorari. Section 107 of the Act adds a new chapter, Ch. 154, which is relevant to the retroactivity analysis. Accordingly, respondent includes those provisions in an appendix to this Brief In Opposition.

This case involves a narrow, unique fact situation and is therefore unlikely to offer much in the way of precedential value. It is not an appropriate vehicle for explaining to the lower courts whatever differences there may be, if any, in the standard of review applicable to habeas cases under the old and new habeas statutes, because in this case, the result under either statute is the same: respondent received ineffective assistance of counsel based on the specific, unique facts of this case for two different, individually sufficient, errors by trial counsel; in addition, based on the unique facts of the prosecutor's argument and then effective, now repealed, Missouri law[5] regarding capital sentencing procedures, the prosecutor's argument misleadingly and inaccurately characterized Missouri law and improperly minimized the jury's sentencing responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985).

Furthermore, there is no conflict in the circuit courts of appeals. The only circuit court cases that have addressed whether the Act is retroactive have concludded that it is not. See infra at 23. This Court should also deny review in this case

[5] Mo. Ann. Stat. § 565.006.2 (Vernon's 1979)(repealed 1984) ("the capital sentencing statute") provided that:

> The jury, or the judge in cases tried by the judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; except that, the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment.

Id. (emphasis added).

because it is evident that the circuit courts are fully able to discern the Act's non-retroactivity, and there is no conflict in the circuits that needs clarification.

IV. Even If The Antiterrorism And Effective Death Penalty Act Of 1996 Were Retroactive To Cases In Which The Court Of Appeals Had Issued Both An Opinion Disposing Of The Case And The Mandate, This Court Should Still Deny Review Because The Judgment In This Case Would Be Not Be Affected By The New Habeas Statute.

First, as to the ineffective assistance of counsel ("IAC") claims, the Act had no effect upon this Court's directives for analyzing IAC claims as set forth in Strickland v. Washington, 466 U.S. 668 (1984). What was ineffective before remains ineffective now.

All that the State asserts may have changed under the Act is that the federal Courts are to be more deferential of State court rulings of law that are "reasonable." Pet. at 15. (Mo. S. Ct.'s analysis was not "unreasonable"). Because the state court cited Strickland and purported to do Strickland analysis, the State concludes that "respondent cannot colorably contend that the Missouri Supreme Court's decision was contrary to clearly established federal law" or "an unreasonable application of the Strickland analysis." Id. Petitioner's reading of the new statute, Act § 104(3), App. at A168, as precluding review of state court judgments when the state court correctly cites the controlling case but misapplies the law, is untenable.

The plain language of the new statue provides that state court judgments are to be upheld unless the state adjudication

"resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." App. at A168. The "unreasonable application of" law standard is a permissive alternative to the better understood and less vague "contrary to" law standard. Id. A state judgment cannot stand if it is either contrary to law, or an unreasonable application of law. Id. Without resolving what is an unreasonable application of federal law, the state court judgment cannot stand if it is "contrary to" law. As set forth in the well-reaasoned opinions of both the Eighth Circuit and the U.S. Magistrate, the state court judgments were contrary to Strickland and Caldwell.[6]

---

[6] One additonal ground in support of the judgment below is that the prosecutor's argument was an inaccurate statement of Missouri law. See Mo. Ann. Stat. § 565.006 (1979) (repealed 1984) (judge required to impose jury's sentence). Notwithstanding Missouri's general sentencing statute and the general sentence reduction rule, Mo. Rev. Stat. § 557.036 (Cum. Supp. 1984), and Mo. R. Crim. P. 29.05, the plain language of § 565.006 controls, because it is a specific, narrow provision applicable only to capital sentencing proceedings. See generally Appellee Driscoll's Petition For Rehearing By The Panel, Driscoll v. Delo, Nos. 94-2993 & 94-3266 (8th Cir.) (filed Jan. 2, 1996) at 7-14 (hereinafter "Driscoll's Reh'ng Pet.").

The Missouri Supreme Court's conclusion, that the prosecutor's argument was reasonable, was based on the purported ability of a state tral judge to reduce the sentence under Rule 29.05. App. at A128. In reaching this conclusion, which allowed the court to affirm the death sentence, the Missouri Supreme Court ignored the long established rule in Missouri along with specific controlling case that held the capital sentencing statute, § 565.006, to be a special creature not controlled by general sentencing provisions. See State ex rel. Eggers v. Enright, 609 S.W.2d 381, 383-84 (Mo. banc 1980). See generally Driscoll's Reh'ng Pet. at 7-14.

For that reason the Missouri Supreme Court's conclusion that the prosecutor's statements were accurate summaries of Missouri law has no fair or substantial support in state law and cannot provide a basis for denial of Driscoll's Caldwell claim. See,

73 F.3d at 706-13, App. at A8-A28; App. at A63-A70, A72-A85. Respondent does not argue otherwise, but instead argues only that the Missouri Supreme Court's findings or analysis were either "reasonable," or not "unreasonable." Pet. at 15, 17, 18.

Accordingly, grant of review in this case would serve no purpose, because application of the Act to Driscoll would not change the outcome of the case, nor explain how the Act might require a different standard of review than previously. If the Court desires a vehicle to resolve the question of whether the Act is applicable to cases decided before the Act's passage, it should choose not this case, but some other which involves a court of appeals ruling that is not defensible and offers the potential to illuminate fully the differences between the standard of review under the Act and its predecessor.

V. This Court Should Not Grant Review In This Case Because The State's Proffered Interpretation Of The New Habeas Statute Would Be Unconstitutional, Anyway, And Missouri Does Not Contend That This Case Was Incorrectly Decided Under The Old Habeas Statute.

To the extent that the State's understanding of new § 2254(d) deprives this court of the right to correct constitutional errors in wrong but not unreasonably wrong state court decisions, the State's recommended interpretation violates

---

e.g., Howlett by and through Howlett v. Rose, 496 U.S. 356, 366 (1990); James v. Kentucky, 466 U.S. 341, 348-49 (1984); Barr v. City of Columbia, 378 U.S. 146, 149 (1964); Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100 (1938); Ward v. Love County Bd. of Comm'rs, 253 U.S. 17, 22 (1920); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 357-58 (1816). See generally Driscoll's Reh'ng Pet. at 4-7.

this Court's obligation to declare what the law is and to interpret the Constitution. U.S. Const., art. III, §§ 1 and 2.

The State's overly deferential formulation of § 2254(d)(1) also ignores the plain meaning of "contrary to law,"[7] and the myriad instances where federal courts have applied the phrase. The phrase does not limit federal review of state legal decisions to "arbitrariness," "clear error," "abuse of discretion," or any other attribute needed to overcome a presumption in the State's favor. Nor does the phrase establish such a presumption. The phrase simply tells the federal court to determine whether the state court "decision ... was contrary to ... Federal law."

In advocating an interpretation of new §2254(d) that requires Article III judges to defer to reasonable, but wrong, interpretations of federal constitutional law by state court judges, e.g., Pet. at 15-18, Missouri oversteps the limitations of the fundamental Article III principle that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

If Missouri's interpretation prevailed, and a federal court had to defer to state decisions that were "close enough" to federal law or not "unreasonably" in conflict with it, the rule in Marbury would be no more. Marbury's dictate is dispositive:

---

[7] See Act § 104(3) (habeas relief to be granted only if the State adjudication "resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law") (emphasis added).

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.... This is the very essence of judicial duty." Marbury, 5 U.S at 177-78. Accord Gutierrez de Martinez v. Lamagno, 115 S.Ct. 2227, 2234 (1995) ("Congress may be free to establish a ... scheme that operates without court participation" but may not "instruct[] a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate."); Plaut v. Spendthrift Farm, 115 S.Ct. 1447, 1453-55 (1995); United States v. Klein, 80 U.S. (13 Wall.) 128, 145-47 (1871).

Moreover, the deferential standard advocated by Missouri withdraws the very Article III obligation that discouraged this Court, in Wright v. West, 505 U.S. 277 (1992), from adopting its own rule of deference in habeas. As Justice O'Connor stated, concurring in the Court's decision to table the deference proposal, the Court has never

> held in the past that federal courts must presume the correctness of State court legal conclusions ... [n]or [has] a State court's incorrect legal determination ... ever been allowed to stand because it was reasonable. We have always held that Federal courts, even on habeas, have the independent obligation to say what the law is.

Id. at 305 (O'Connor, J., concurring).

As written, § 2254(d)(1) preserves the constitutionally essential control by Article III judges, but only so long as the Act is interpreted to allow them to embark on plenary review of state court legal determinations. There is no reason to interpret the Act otherwise. Accordingly, Missouri's unduly

deferential interpretation of the Act cannot apply, for it would render the Act unconstitutional under Article III.

Requiring less than the Court's best judgment on the effect of federal law would also violate the Due Process Clause. See Cooper v. Oklahoma, 116 S.Ct. 1373, 1383 (1996) (violation occurs when "principles of justice so rooted in the traditions and conscience of our people as to be ranked fundamental" are offended). Plenary review is the unbroken tradition in this country when federal courts review state court legal judgments, including habeas judgments. Driscoll believes that there is no reviewing court in this country, state or federal, which has ever--in the context of reviewing applications of the Constitution to determine the rights of prisoners or in any other vaguely similar context-- conceded away the reviewing court's power of plenary review of the "legal," and particularly the Constitutional, determinations of the court whose determination is being reviewed. Adopting the State's deferential interpretation of the Act's standard of review uproots this fundamental principle of justice. It also violates due process.

Requiring less than the court's best judgment on the effect of federal law would also violate the Suspension Clause and improperly suspend the writ of habeas corpus. U.S. Const., art. I, § 9, cl. 2. This Court has repeatedly noted that "'there is no higher duty than to maintain [the writ of habeas corpus] unimpaired.'" Johnson v. Avery, 393 U.S. 483, 485 (1969) (quoting Bowen v. Johnston, 306 U.S. 19, 26 (1939)). While one

might debate what claims have historically been cognizable in habeas corpous action, the scope of legal, as opposed to factual, review cannot be debated: it has been plenary since at least 1807. See, e.g., Ex parte Bollman, 8 U.S. (4 Cranch) 75, 114, 125, 135-36 (1807) (Marshall, C.J.) (describing scope of habeas review as "do[ing] that which the court below ought to have done," the Court "fully examin[es] and attentively consider[s]" whether probable cause existed for the challenged arrest); Moore v. Dempsey, 261 U.S. 86, 92 (1923) (Holmes, J.) (federal habeas judge has "duty of examining ... for himself [whether the facts], if true as alleged ... make the trial ... void"); Brown v. Allen, 344 U.S. 443, 506-07 (1953) (Frankfurter, J.) ("When ... the issue turns on basic facts ..., [u]nless a vital flaw be found in the process ..., the District Judge may accept the determination in the State proceeding," but when the case "calls for interpretation of the legal significance" of the historical facts, "District Judge must exercise his own judgment"); Miller v. Fenton, 474 U.S. 104, 112 (1985) (O'Connor, J.) ("an unbroken line of cases, coming to the Court both on direct appeal and on review of applications to lower federal courts for a writ of habeas corpus, forecloses the Court of Appeals' conclusion that [a mixed question] merits something less than independent federal consideration").[8]

---

[8] Moreover, if there were only one right provided by the original Constitution as a protection against federal abuses of power that the drafters of the Fourteenth Amendment intended to incorporate as a protection against state abuses of power, it was the right to routine and continuous access to the writ of habeas

For all of these reasons, application of the State's overly deferential interpretation of the Act's new § 2254(d) would violate the Constitution.

VI. In Any Event, The Antiterrorism And Effective Death Penalty Act Of 1996 Is Not Retroactive To Cases In Which The Court Of Appeals Had Issued Both An Opinion Disposing Of The Case And The Mandate.

On April 24, 1996, President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "the Act"), Pub. L. No. 104-132, 110 Stat. 1214. See Edens v. Hannigan, 1996 WL 339763 *1 n.1 (10th Cir. June 20, 1996). The Act became effective when signed by President Clinton, see United States v. York, 830 F.2d 885, 892 (8th Cir. 1987), more than two months after the mandate of the Eighth Circuit issued on February 8, 1996. For a variety of reasons, the Act is not applicable to Driscoll's case.

The starting point in analyzing a statute to determine whether it is retroactive to cases pending at the time of its passage is the statutory language itself. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 835, 110 S.Ct. 1570, 1575 (1990). "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." Landgraf v. USI Film

---

corpus save in time of war or rebellion. See Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873) (habeas is right of national citizenship protected by Fourteenth Amendment); Steiker, Incorporating the Suspension Clause: Is there A Constitutional Right To Federal Habeas Corpus For State Prisoners?, 92 Mich. L. Rev. 862 (1994).

Products, 114 S.Ct. 1483, 1497 (1994). See Kaiser Aluminum, 494 U.S. at 842-44, 855-56, 110 S.Ct. at 1579-81, 1586-87 (Scalia, J., concurring). A two-step test determines whether a statute applies to cases filed before it went into effect.

The first step is determination of Congress' intent. If Congress has "manifested an intent" with respect to the applicability of a statute to pending cases, Congress' intent controls. Landgraf, 114 S.Ct. at 1492. If Congress' intent may not be discerned, the "appropriate default rule" is "prospectivity," not retroactivity. Id. at 1501. See also id. at 1498 ("requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness"). Accordingly, unless Congress has made clear its intention to apply the statute retroactively, it must be given prospective effect. "Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress has made clear its intent." Id. at 1499.

The second step in retroactivity analysis is to determine whether application of the statute to cases predating its enactment has a retroactive effect, i.e., "whether the new provision attaches new legal consequences to events completed before its enactment." Landgraf, 114 S.Ct. at 1499.

Driscoll prevails under both steps. Congress' plain language clearly establishes that the Act was not intended to apply to Driscoll and other pending cases that predate the Act.

Moreover, the application of § 2254(d), as amended, would inequitably attach new consequences to preenactment events.

A. The Act's Plain Language Precludes Any Retroactive Effect Upon Driscoll's Case And All Those Other Habeas Cases Pending Prior To April 24, 1996.

Title I of the Act made two sets of revisions to the habeas statutes. The first set (the "Chapter 153 revisions") is in §§ 101-106 of the Act and modifies provisions in Chapter 153 of the Judicial Code governing all habeas cases. Included within the Chapter 153 revisions of the Act is the amendment of 28 U.S.C. § 2254(d), Act § 104(3), which the State contends changed the standard of review favorably in its favor. See Pet. at 15-18. The other set of habeas revisions added a new chapter to the Judicial Code (the "Chapter 154 revisions") and six new sections. Act § 107 (containing new provisions to be codified at 28 U.S.C. §§ 2261-2266). The Chapter 154 revisions shorten filing deadlines, limit cognizable claims and impose deadlines for judges' rulings. Act § 107 (to be codified at §§ 2262-2266). However, these new provisions apply only in capital cases, and only as a quid pro quo if the State provided the capital prisoner with competent counsel, funds for experts and other advantages during the state postconviction proceedings.[9] Id. (to be codified at § 2261).

---

[9] As the State of Missouri did not satisfy the "opt in" preconditions for the applicability of this chapter, the Chapter 154 revisions are not applicable in this case.

Congress specifically considered the question of whether the new habeas provisions should apply in a case filed before they went into effect, but concluded that only "Chapter 154 ... shall apply to cases pending on or after the date of enactment of this Act." Act § 107(c) (emphasis added). Significantly, unlike Chapter 154, Congress did not call for the retroactive application of the Chapter 153 revisions, including those amending 28 U.S.C. § 2254(d), to previously filed cases.

The obvious explanation for Congress' omission of a retroactivity provision for the Chapter 153 revisions, especially given the inclusion of a retroactivity provision for Chapter 154, is that Congress intended to make the latter but not the former apply in previously filed cases. See Rodriguez v. United States, 480 U.S. 522, 525 (1987) ("where Congress includes particular language in one section of a statute, but it omits it in another section of the same Act, it is generally assumed that Congress acts intentionally in the disparate inclusion or exclusion") (citations and internal quotations omitted).

While a similar but opposite negative inference was not followed in Landgraf, the situation was entirely different. In Landgraf the petitioner sought to make retroactive the bulk of the Civil Rights Act of 1991 based on the negative inference of two minor provisions that provided for prospective statutory effect. 114 S.Ct. at 1494. Thus, the petitioner in Landgraf was swimming against the tide of centuries of jurisprudence that held in disfavor the retroactive application of legislation. Id. at

1497 & n.17. Cf. Kaiser Aluminum, 494 U.S. at 841 (Scalia, J., concurring) ("clear rule of construction ... since the beginning of the Republic, and indeed since the early days of the common law: absent specific indication to the contrary, the operation of nonpenal legislation is prospective only").

In contrast, the negative inference drawn by Driscoll from the retroactive provisions of Chapter 154, Act § 107, is that the remainder of the Act, §§ 101-106, should receive prospective treatment. This Court's rejection of the use of a negative inference in Landgraf is inapt here, precisely because the negative inference here, unlike that in Landgraf, is fully in accord with the historical presumption against retroactivity.

Thus, the negative inference, from Congress' limited provision of retroactive effect for the Chapter 154 revisions, supports prospective application of the Chapter 153 revisions. Moreover, this is not the only basis for Driscoll's contention that the Act does not apply to his or other pre-Act cases. There is more compelling evidence in the plain language of the Act, language which points inexorably to prospective application of Chapter 153.

Another venerable rule of construction prescribes that every word of a statute be given full meaning and effect if at all possible, and militates against interpretations that "read out," make redundant or ignore statutory language. See, e.g., Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825, 837 & n.11 (1988); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803)

(court should not read statutes to contain "surplusage, entirely without meaning"). Because parts of the Chapter 154 revisions become redundant if Chapter 153 were to apply retroactively, this court should construe the Act to effectuate both chapters of Title I, by recognizing Congress' intent that Chapter 153 be given prospective application only.

If Chapter 153 were given retroactive effect, it would render entirely redundant two Chapter 154 provisions. New § 2261(a) provides that the Chapter 154 provisions shall be applicable only in cases "arising under section 2254." New § 2264(b) requires district judges, in adjudicating Chapter 154 cases, to apply revised § 2254(d) and (e), both of which were added by the Act in Chapter 153, Act § 104(3) and (4). This provision is entirely redundant of § 2261(a) (Chapter 154 applies to cases arising under § 2254) unless the Chapter 153 revisions, including the amendment of § 2254, do not apply of their own force to pending cases.

Section 107(c) of the Act makes only "Chapter 154 ... apply to cases pending ... on the date of enactment," but omits Chapter 153 from its pronouncement of retroactivity. As none of the Chapter 153 revisions apply of their own force in previously filed cases, the only way to make some of them apply in the previously filed (capital) cases that are covered by Chapter 154 would be to incorporate the relevant sections by reference into Chapter 154. That is § 2264(b)'s precise function--to allow the newly revised § 2254(d), Act § 104, to apply in the few pending

cases to which Chapter 154 applies retroactively. Were revised § 2254(d) already applicable to all pending cases, as the State of Missouri argues here, Pet. at 12-13, there would be no need to specify that those same sections were applicable in adjudicating Chapter 154 cases under new §2264(b).

Based on the strong presumption of non-retroactivity, the Act's limited prescription of retroactivity to a small portion of habeas cases, and the Act's necessary implication that Chapter 153 is not retroactive when giving effect to all of the Act's provisions, the statute's plain language establishes Congress' intent not to apply Chapter 153 retroactively. This result is sensible, as well, because the Act uses Chapter 154's retroactive application to reward qualifying states that previously gave procedural safeguards to the capital prisoners to whom Chapter 154 applies, and because those advantages make a quicker trip through the federal courts both practical and fair in cases filed before enactment.

Unsurprisingly, of the courts that have addressed the issue, both Circuit Courts of Appeals and the vast majority of District Courts have concluded that Chapter 153 of the Act is not applicable to pending cases. See, e.g., Edens v. Hannigan, 1996 WL 339763 at *1 n.1 (10th Cir. June 20, 1996); Williams v. Calderon, 83 F.3d 281, 285 (9th Cir. 1996); Wilkins v. Delo, No. 91-0861 CV-W-5, slip op. at 2-6 (W.D. Mo. May 15, 1996); Warner v. United States, 1996 WL 242889 at *9 (E.D. Ark. May 10, 1996); United States v. Gilmore, 1996 WL 243047 at *3 (N.D. Ill. May 9,

1996); Austin v. Bell, 1996 WL 284882 at *1-3 (W.D. Tenn. May 9, 1996); Schlup v. Bowersox, No. 4:92CV443 JCH, slip op. at 20 (E.D. Mo. May 2, 1996). See also Centanni v. Washington, 1996 Wl 251438 (N.D. Ill. May 8, 1996) (expressing doubts about retroactivity, but not deciding the issue). But see Leavitt v. Arave, 1996 WL 291110 (D. Idaho May 31, 1996) (finding Act retroactive). This Court should likewise find the Act is not retroactive to pending cases.

B. The Act May Not Be Retroactively Applied To Driscoll's Habeas Petition Because It Would Attach New Legal Consequences To Actions Taken Before The Act Was Enacted.

Assuming arguendo that the standard of review under the old and new habeas statute is, in fact, different, the Act could not apply to Driscoll because it would attach new legal consequences to actions taken before the Act was enacted. The State argues for the Act's retroactive application to pending cases, Pet. at 13, notwithstanding the Act's plain language, on the ground that the Act regulates "secondary rather than primary conduct." It is true that some of this Court's decisions have characterized habeas corpus review as "secondary" and more limited than direct appeal review, e.g. Lonchar v. Thomas, 116 S.Ct. 1293, 1306-07 (1996) (Rehnquist, C.J., concurring) (asserting that petitioner's dilatory course of conduct in habeas proceedings will not entitle him to delay execution, given secondary and limited scope of federal habeas review). Cf. Barefoot v. Estelle, 463 U.S. 880, 887-88 (1983). That does not mean that the right of habeas

corpus is a secondary right or that pursuit of that right is "secondary conduct." See U.S. Const., art. I, § 9, cl. 2 ("Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it").

The secondary and limited scope of review of the writ of habeas corpus is, of course, restricted to U.S. Constitutional issues, and then, only after another court, state or federal, has already reviewed the case and found no violation. Understood in this context, it is understandable that inequitable conduct by a petitioner, who unreasonably seeks only to delay execution of his sentence and not resolution of a non-frivolous, Constitutional issue, may dis-entitle him to the procedural and substantive protections governing consideration and disposition of habeas petitions.[10] See Lonchar, 116 S.Ct. at 1307 (citing Barefoot).

However, because the Act attaches "new legal consequences to events completed before its enactment," the Act cannot be given retroactive effect even if it regulated secondary conduct, which it does not.[11] Cf. Landgraf, 114 S.Ct. at 1499. The State would

---

[10] However, this is not a case where a habeas petitioner has filed an eleventh-hour, first habeas petition, or a successive or abusive petition; nor has Driscoll otherwise engaged in inequitable conduct aimed at the indefinite delay of the State's right to carry out its sentence. See Habeas Rule 9. Cf. Barefoot v. Estelle, 463 U.S. 880, 887-88 (1983).

[11] For example, the Missouri Supreme Court and lower Missouri courts have already ruled on the merits of Driscoll's claims and made some, but conceivably not all, relevant factual determinations that presumably are supported by the underlying state records. Those courts are now closed to Mr. Driscoll. He

deprive Driscoll of his constitutional right to pursue the writ of habeas corpus by retroactively changing the rules in the middle of the game. Fortunately for him, the Constitution and the retroactivity principles established by this Court will not allow it.

Essentially, by seeking to impose the Act retroactively upon Driscoll, the State must contend that under the revised habeas statute, first, Driscoll has received "fair notice"; second, that he cannot show "reasonable reliance" on prior actions of his, the State and the courts during direct and collateral review of his conviction and death sentence; and third, that he has no "settled expectation[]" in review of the constitutionality of the conviction and death sentence via the writ of habeas corpus. See Landgraf, 114 S.Ct. at 1499. Cf. U.S. Const. art. I, § 9, cl. 2 ("Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"). See also Lonchar v. Thomas, 116 S.Ct. 1293, 1298 (1996) (writ of habeas corpus demands "application of basic

---

cannot go back and ask for further findings of fact or law. Driscoll had no reason to do so years ago when the determinations were made, as he obtained merits rulings that effectively gave him the right to full and independent review of his constitutional claims in federal court.

Principles of fairness and reliance preclude the Act's application of a new, deferential standard of review to these actions taken years ago by Driscoll and the courts. "The presumption against statutory retroactivity," is so strong that it operates even when retrospective application "would vindicate [the statute's] purpose more fully" and when the rule attaching new consequences to events that antedated the Act is "procedural" rather than substantive. Landgraf, 114 S.Ct. at 1507-08, 1502 n.29, 1505 n.34; id. at 1524-25 (Scalia, J., concurring).

constitutional doctrines of fairness"); id. at 1300 (recognizing "the important right of those raising serious habeas questions to have their claims thoroughly considered by the district court"). Under the circumstances of this case, retroactive application of the Act's new provisions for procedural deference to State determinations of fact and law operates to attach new legal consequences to actions taken by Driscoll prior to the passage of the Act.

Under any and all of Landgraf's formulations of a "genuinely 'retroactive,'" and hence, inapplicable, statute, 114 S.Ct. at 1503, new § 2254(d)'s spotlight on prior adjudicative and decisional behavior of state courts--which in this case occurred at least five years before enactment--qualifies it as retroactive: The statute "attaches a new disability[] in respect to transactions or considerations already past," 114 S.Ct. at 1499; it "changes the legal consequences of acts completed before its effective date," id. at 1498 n.23; it "gives a quality or effect to acts or conduct which they did not have ... when they were performed," id.; it is "quintessentially backward-looking," id. at 1506; "the relevant activity that the rule" considers did not "occur after the effective date of the statute," id. at 1524 (Scalia, J., concurring) (all citations omitted).

Accordingly, the Act cannot be retroactively applied to Driscoll.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

BRUCE D. LIVINGSTON, ATTORNEY-AT-LAW

Bruce Dayton Livingston
Counsel of Record
120 South Central Ave., Suite 1510
St. Louis, MO 63105
(314) 863-4151 (phone)
(314) 863-0720 (fax)

Attorney for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was placed in the United States mail, postage prepaid and properly addressed to: Stephen D. Hawke, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, and the Solicitor General Of the United States, Room 5614, Department of Justice, 10th St. & Constitution Ave. N.W., Washington D.C. 20530, this 17th day of July, 1996.

Bruce D Livingston